



**AGREEMENT FOR THE TRANSFER OF RECORDS (CONTROLLER – PROCESSOR)**

**between**

**THE KEEPER OF THE RECORDS OF SCOTLAND**

**and**

**THE MENTAL WELFARE COMMISSION FOR SCOTLAND**

## 1. DEFINITIONS AND INTERPRETATION

1.1. In this Agreement, unless the context otherwise requires, the following terms shall have the following meanings:

“**1990 Regulations**” means the Disposal of Court Records (Scotland) Regulations 1990;

“**Agreement**” means this legally binding Agreement between the Parties consisting of clauses and Schedule 1 (*Data Protection*) for the transfer of records between the Keeper and the Client;

“**Business Day**” means a day other than a Saturday, Sunday or the Keeper’s bank holiday in Scotland within the meaning of the Banking and Financial Dealings Act 1971.;

“**Client**” means the Mental Welfare Commission for Scotland, Thistle House, 91, Haymarket Terrace, Edinburgh, EH12 5HE (MWC);

“**Controller**”, “**Processor**”, “**Process**” (and cognate expressions “**Processing**” and “**Processed**”), “**Data Subject**” and “**Personal Data**” have the meanings given in the Data Protection Laws and cognate expressions shall be construed accordingly;

“**Data Protection Laws**” means any law, statute, subordinate legislation, regulation, order, mandatory guidance or code of practice, judgment of a relevant court of law, or directives or requirements of any regulatory body which relates to the protection of individuals with regard to the Processing of Personal Data to which a Party is subject including the Data Protection Act 2018 and any statutory modification or re-enactment thereof and the GDPR

“**DPA 2018**” means the Data Protection Act 2018;

“**GDPR**” means the General Data Protection Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016, as amended by the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 on the protection of natural persons with regard to the Processing of Personal Data and on the free movement of such data, and repealing Directive 95/46/EC

“**UK GDPR**” means the General Data Protection Regulation (*Regulation (EU) 2016/679*) as amended by the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019;

“**EI(S) Regulations 2004**” means the Environmental Information (Scotland) Regulations 2004 (and any subordinate regulations made under them from time to time or any superseding or amending regulations) together with any guidance and/or codes or practice issued by the Information Commissioner, the Scottish Information Commissioner and/or any relevant government department in relation to such regulations.

“**FOISA 2002**” means the Freedom of Information (Scotland) Act 2002 and any subordinate legislation made under this Act from time to time or any superseding or amending enactments or regulations, together with any guidance and/or codes of practice issued by the Information Commissioner, the Scottish Information Commissioner and/or any relevant government department in relation to such legislation;

**“Force Majeure Event”** means any event or occurrence affecting the performance by a Party of its obligations under this Agreement arising from acts, events, omissions or circumstances beyond either party's control, including but not limited to acts of god, perils of the sea or air, fire, flood, drought, explosion, sabotage, accident, embargo, riot, civil commotion or civil authority including acts of local government and parliamentary authority; breakdown of equipment or telecommunication failures (but only insofar as arising from acts, events, omissions or circumstances beyond either party's control); war, terrorism, nuclear, chemical or biological contamination; extreme adverse weather conditions; epidemic; and labour disputes of whatever nature and for whatever cause arising including, without prejudice to the generality of the foregoing, work to rule, overtime, strikes and lock outs;

**“Keeper”** means the Keeper of the Records of Scotland;

**“Law”** means any law, statute, subordinate legislation within the meaning of section 21(1) of the Interpretation Act 1978, bye-law, enforceable right within the meaning of section 2 of the European Communities Act 1972, regulation, order, mandatory guidance or code of practice, judgment of a relevant court of law, or directives or requirements of any regulatory body with which the Client is bound to comply.

**“NRS”** means National Records of Scotland;

**“NRS Client Web Archive”** the collection of archived copies of Websites that will be captured, preserved and made accessible through the NRS Web Continuity Service.

**“NRS Web Continuity Service”** means the service provided by NRS by which users who encounter ‘404 page not found’ error messages on specified live Websites are redirected to the NRS Client Web Archive, where a search for an archived version of the content is made.

**“Party”** Means either of the Keeper or the Client;

**“Personal Data”** has the meaning given in Data Protection Laws.

**“Personal Data Breach”** a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, Personal Data transmitted, stored or otherwise Processed;

**“PR Act 1958”** means the Public Records Act 1958;

**“PR(S) Act 1937”** means the Public Records (Scotland) Act 1937;

**“PR(S) Act 2011”** means the Public Records (Scotland) Act 2011;

**“Schedule”** means the Schedule (*Data protection*) (including its Annex) to this Agreement

**“ScotlandsPeople Website”** means the Government Website and Branding owned, operated and managed by NRS which is accessed from the domain [www.scotlandspeople.gov.uk](http://www.scotlandspeople.gov.uk);

**“Sub-processor”** any third party appointed by a Processor to Process Personal Data on behalf of that Processor in connection with this Agreement.

**“Web Page(s)”** means a specific collection of information provided by a Website and displayed to a user in a web browser.

**“Website(s)”** means a collection of Web Pages and related content located under a single domain name typically produced by a single person or organisation. All publically accessible Websites collectively constitute the world wide web.

- 1.2 Where in this Agreement a definition relates to the scope or details of the Transfer of Records or any part of the Agreement which may be amended under the Change Control Procedure, then if a Change is made in accordance with that procedure, the relevant definition shall be deemed to be amended to reflect the relevant Change.
- 1.3 The interpretation and construction of this Agreement is subject to the following provisions:
  - (a) words importing the singular meaning include, where the context so admits, the plural and vice versa;
  - (b) references to any statute, enactment, order, regulation or other similar instrument are construed as a reference to the instrument as amended by any subsequent instrument or re-enacted;
  - (c) references to any person include natural persons and partnerships, firms and other incorporated bodies and all other legal persons of whatever kind and however constituted and their successors and permitted assignees or transferees;
  - (d) the words “include”, “includes” and “including” and similar expressions are to be construed as if they were immediately followed by the words “without limitation”; and
  - (e) headings are included in this Agreement for ease of reference only and do not affect the interpretation or construction of this Agreement.

## **2. PURPOSE AND STATUS OF THIS AGREEMENT**

- 2.1. This Agreement sets out the understanding between the Keeper and the Client on how the process of depositing, storing and accessing records of enduring historical, cultural and research value which have been or will be transferred from the Client to NRS will operate. Deposit of these types of records with NRS is pursuant to either:
  - 2.1.1. section 1, section 1A, section 2 or section 2A of the PR(S) Act 1937 (as applicable) and in fulfilment of the Client’s record management obligations under the PR(S) Act 2011; or
  - 2.1.2. section 5 of the PR(S) Act 1937 and in fulfilment of the Client’s record management obligations under the PR(S) Act 2011; or
  - 2.1.3. section 11A of the PR(S) Act 1937.
- 2.2. This Agreement is not intended to be legally binding where it is between government departments who are not able to enter into contracts with each other in terms of section 209(3) (*Application to the Crown*) of the DPA 2018. In all other cases, this Agreement is not intended to be legally binding with the exception of the following which shall be legally binding:
  - 2.2.1. clause 1 (*Interpretation*);
  - 2.2.2. this clause 2.2;
  - 2.2.3. clauses 6.4, 6.5, 6.9 and 6.10 (*Respective obligations, access and use*);
  - 2.2.4. clauses 7.1, 7.2 and 7.9 (*Enquiries, requests and retransmission*);
  - 2.2.5. clauses 8.2 and 8.3 (*Copyright*);
  - 2.2.6. clause 9 (*Disputes*);

- 2.2.7. clauses 10.1, 10.2 10.3 and 10.4 (*Term, termination and review*);
- 2.2.8. clause 0 (*Governing law and jurisdiction*); and
- 2.2.9. the Schedule (*Data Protection*).

2.3. Nothing in this Agreement is intended to, or shall be deemed to, establish any partnership or joint venture between the parties, constitute either party as the agent of the other party, nor authorise either of the parties to make or enter into any commitments for or on behalf of the other party.

### **3. BACKGROUND**

3.1. The Keeper is responsible to the Scottish Ministers for records transmitted to him under various statutory provisions including the PR(S) Act 1937 and section 3 of the PR Act 1958, as well as for records of the courts and those of independent origin selected for permanent preservation. The Keeper's functions are carried out by NRS, a non-Ministerial office forming part of the Scottish Government. NRS preserves Scotland's national archives so that they are available for current and future generations; it registers births, marriages, civil partnerships, deaths, divorces and adoptions; it operates the census; it publishes information about Scotland's population and households; it maintains the National Health Service Central Register; and it connects people of Scots ancestry with their past.

3.2 The Client is the Mental Welfare Commission for Scotland (MWC). Its aims are to uphold the rights and promote the welfare of individuals with mental illness, learning disabilities and related conditions, and to ensure that their care, treatment and support is lawful. The Commission's powers and duties are outlined primarily in two pieces of legislation: the Mental Health (Care and Treatment) (Scotland) Act 2003 and the Adults with Incapacity (Scotland) Act 2000. It was established originally under the Mental Health (Scotland) Act 1960 which replaced various bodies dating back to 1857. The MWC is accountable to Ministers of the Scottish Government for its statutory duties and how it spends public money. The MWC carries out work and produces reports independently from the Scottish Government. Records charting the MWC's history, high-level decision making and functions are deposited with the National Records of Scotland to preserve these public records for the nation. The Commission is also the data controller for the records of the National Confidential Forum (the NCF or the Forum). The Forum was set up as part of the Victims and Witnesses (Scotland) Act established in July 2014, and came to an end on the 28 June 2021 under the terms of the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021. During its lifespan, the NCF was a committee of the MWC and did not exist as a separate legal entity from the Commission. Nonetheless, it operated independently. Key records of the NCF have also been transferred to the National Records of Scotland for permanent preservation.

### **4. STATUTORY FRAMEWORK**

4.1. Section 5(1) of the PR(S) Act 1937 states that: *It shall be lawful for any Government Department, board of trustees, or other body or person having the custody of any records belonging to His Majesty and relating exclusively or mainly to Scotland (other than the documents specified in section four of this Act) to transmit such records to the Keeper [.]*

4.2. The PR(S) Act 2011 obliges the Client to manage its public records in accordance with a records management plan, agreed with the Keeper, which includes provision for identifying and transferring records of enduring value to an appropriate archive repository.

## 5. RECORDS TRANSFERRED TO THE KEEPER, OWNERSHIP AND TERMS OF DEPOSIT

5.1. The records referred to in this Agreement are Client records of enduring value which are worthy of permanent preservation for their historical, cultural and research value, as determined by the Keeper in agreement with the Client. The records can be in any format, including paper and born digital (electronic). This Agreement covers the following records: annual reports, minutes of meetings, key policies, strategic plans, job descriptions, operational documents (when related to core activities), publications, NCF corporate governance records and redacted testimonies of NCF participants.

This Agreement also covers Websites owned and administered by Client: (the “**Websites**”).

The Websites (if applicable) are important public records worthy of permanent preservation, and consequently shall be archived by the NRS Web Continuity Service as and when agreed by the Client and the Keeper. The Client agrees to complete the separate *NRS Web Continuity Service Questionnaire for Website Owners* which confirms the Client’s permission for NRS to archive the Websites specified in the questionnaire. The *NRS Web Continuity Service Questionnaire for Website Owners* also provides further details of the service including ownership of archived content, frequency of capture, and mutual responsibilities.

The records (including any Websites, if relevant) set out in this clause 5.1 (and other records/Websites which the Client may transfer to the Keeper from time to time) are known as the “**Client Records**.”

5.2. The Keeper agrees to the deposit of the Client Records on behalf of the Scottish Ministers under section 5 of the PR(S) Act 1937 as a collection of national importance, and in fulfilment of the Client’s records management obligations under the PR(S) Act 2011.

5.3. Ownership of the Client Records rests with the Client.

## 6. RESPECTIVE OBLIGATIONS, ACCESS AND USE

6.1. The Client agrees to provide the Keeper with access to its record stores to facilitate identification, appraisal and selection of records considered worthy of permanent preservation in NRS.

6.2. The Client *agrees to ensure that its records are properly managed to enable appraisal and processing by NRS.*

6.3. The Client agrees to ensure that any classified records selected for transfer to the Keeper have been declassified, with all protective markings removed from documents, prior to transmission to the Keeper.

6.4. The Client has sole discretion in connection with the access and use of the Client Records. The Client agrees to carry out a sensitivity review of the Client Records prior to transfer and to notify the Keeper in writing of any restrictions relating to the use and/or access of the Client Records (including any restrictions under Data Protection Legislation, FOISA 2002 and the EI(S) Regulations 2004). Such notification shall take place no later than at the time that the Client Records are transmitted to the Keeper and subsequently if there are any changes to such restrictions.

- 6.5. The Client instructs the Keeper to store, manage and maintain the Client Records in accordance with the Keeper's relevant policies and procedures.
- 6.6. Where born digital records are deemed worthy of permanent preservation in NRS by the Keeper, the Client agrees to work with NRS in line with the current version of the *Depositor Guidance For the Transfer of Archival Born Digital Records*.
- 6.7. The Keeper may refuse to accept for preservation records in any format which are not considered suitable for permanent preservation, e.g. have poor explanatory documentation or metadata; are in poor physical condition or are digitally degraded; are disordered or disbound (especially where it is impossible to establish the original order with any certainty).
- 6.8. The Keeper may refuse to accept for preservation records in any format which are not considered suitable for permanent preservation, e.g. published information, library material and records still considered to be current or semi-current. These will remain in the custody of the Client.
- 6.9. The Keeper will place the catalogue consisting of a description of the Client Records onto the NRS online catalogue to permit public access to, and facilitate use of, the Client Records in the collection (always subject to clause 6.4). The online catalogue will be anonymised in accordance with any access restrictions notified by the Client.
- 6.10. Where the Client Records involve Personal Data, both parties agree to comply with their obligations under Data Protection Legislation. The Schedule (*Data Protection*) sets out the agreement between the Keeper and the Client on how the Keeper will Process Personal Data on behalf of the Client, including the scope and type of Personal Data that will be Processed on behalf of the Client. Separately, the Keeper is a Controller in respect of any Personal Data contained within the business and/or contact details of the Client provided by the Client to the Keeper for the performance of this Agreement (such Personal Data being separate from the Client Records).

## 7. ENQUIRIES, REQUESTS AND RETRANSMISSION

- 7.1. As the owner of the Client Records, the Client is responsible for handling all enquiries and requests in respect of the Client Records in its sole discretion. Clauses 7.2 to 7.4 (inclusive) are subject to this general principle.
- 7.2. Where possible, NRS may handle general enquiries about the Client Records as part of its normal search room service. The Client will supply the Keeper with sufficient instructions, advice, information or training to permit NRS to deal effectively with such general enquiries. Where the enquiry is complex or where NRS does not have sufficient instructions or information, the enquiry shall be referred to the Client who will either deal with the enquiry directly or provide instructions for NRS to be able to do so.
- 7.3. **Freedom of information requests.** Where the Client Records are subject to FOISA 2002, the Keeper will comply with its obligations under section 22 of FOISA 2002 in respect of Client Records which are not open. The Keeper will refer requests to the Client who will advise the Keeper of the Client's decision in accordance with sections 22(2) and 22(3) of FOISA 2002. The Keeper will refer any requirements for review of the Client's decisions to the Client and the Client will review its decision and inform the Keeper of the outcome, including a statement of its reasons, all in accordance with sections 22(4) and 22(5) of FOISA 2002. The Client must advise the Keeper of decisions and review outcomes promptly, to ensure that the Keeper has sufficient time to respond within the statutory deadlines as stipulated under sections 10(2) and 21(2) of the FOISA 2002.

- 7.4. **Requests for environmental information.** Where the Client Records are subject to the EI(S) Regulations 2004, the Keeper will refer to the Client requests made under regulation 5(1) of the EI(S) Regulations 2004, in respect of access to environmental information contained in Client Records which are not open. The Keeper will also refer to the Client representations for a review made under regulation 16 of the EI(S) Regulations 2004. The Client will advise the Keeper of the Client's decisions in accordance with regulations 15 and/or 16 of the EI(S) Regulations 2004 (as applicable). In both cases the Client must advise the Keeper of the relevant decision or review outcome promptly to ensure the Keeper has sufficient time to respond within the statutory 20-working-day deadline as stipulated under regulations 5(2)(a) and 16 of the EI(S) Regulations 2004 (as applicable). The 20-day time period for responding to requests can be extended to 40 days where the information requested is complex and voluminous, per regulation 7 of the EI(S) Regulations 2004 and the Client shall notify the Keeper promptly at the earliest opportunity when it considers that the time period should be so extended.
- 7.5. Where either the Client (or NRS, if dealing with queries on behalf of the Client) requires to have sight of any part of the Client Records, the parties agree that, where this is possible, a digital surrogate (or another surrogate format) of the relevant Client Records will be provided by NRS in the first instance. For Client Records which are required for the purposes of court proceedings under Part I (*Court Records*) of the PR(S) Act 1937, the parties agree that the original Client Records shall be retransmitted.
- 7.6. Subject to clause 7.5, the Keeper will temporarily return ("retransmit") the original Client Records:
- 7.6.1. for the purpose of enquiries under clauses 7.1 to 7.4, should it prove impossible either:
- (a) for the Client to provide NRS with instructions on how to deal with the relevant enquiry and/or for NRS to subsequently adequately deal with the enquiry in accordance with the Client's instructions; or
  - (b) for the Client to deal with the enquiry directly
- in either case if the Client considers that surrogate formats are insufficient;
- 7.6.2. in cases where Client Records are transmitted to the Keeper either under section 5(1) or section 5(2) of the PR(S) Act 1937, for the Client's purposes on request, under section 5(3) of the PR(S) Act 1937;
- 7.6.3. in cases where Client Records are transmitted to the Keeper under Part I (*Court Records*) of the PR(S) Act 1937, for the purpose of court proceedings; or
- 7.6.4. in cases where Client Records are transmitted to the Keeper under section 11A of the PR(S) Act 1937 and subject to clause 7.6.1, for the Client's purposes upon reasonable request by the Client.
- 7.7. Arrangements for collection and return of retransmitted Client Records shall be the responsibility of the Client. The Keeper agrees to make the Client Records available for collection by the Client within 2 Business Days of receipt of a written request for retransmission. Retransmitted Client Records in the custody of the Client will be handled with care, in accordance with the NRS document *Information and Regulations for Retransmitted Files* as updated from time to time.
- 7.8. Original Client Records which have been retransmitted to the Client shall be returned to NRS as follows:



- 7.8.1. where retransmission is either under Part I (*Court Records*) or section 5(3) of the PR(S) Act 1937, the Client must return each retransmitted Client Record to the Keeper as soon as may be after the retransmitted Client Record has ceased to be required for the purposes for which it was retransmitted; and
  - 7.8.2. in all other cases, the Client must return the original Client Records promptly after these are no longer required for the purpose for which they were retransmitted.
- 7.9. The application of Data Protection Legislation is without prejudice to the Keeper's statutory obligations under FOISA 2002 and the EI(S) Regulations 2004. The Keeper is not a Controller under Data Protection Legislation by virtue of the Keeper complying with its obligations under FOISA 2002 and the EI(S) Regulations 2004.

## **8. COPYRIGHT**

- 8.1. The Keeper will manage the Client Records in accordance with applicable UK copyright legislation.
- 8.2. Client Records are subject to private copyright and the copyright holder is the Client. The Client must identify any third-party copyright material present in the Client Records in advance of transfer to the Keeper and, where possible, details of the copyright owner should accompany the transfer of this material.
- 8.3. To the extent that the Client holds the copyright to the material within the Client Records, the Client grants the Keeper a non-exclusive, world-wide and royalty free licence to use, copy and modify such materials contained within the Client Records for any purpose which the Keeper may deem suitable in line with NRS strategic aims and for improvement of public access to the Client Records), which for the avoidance of doubt includes publication on the internet. This may include use of the licenced materials for any publicity, marketing or educational initiatives, and include the creation of surrogate digital images to answer public enquiries, for use in NRS search rooms and the ScotlandsPeople Family History Centre. or for use on ScotlandsPeople Website and partner Websites operated with others including ScotlandsPlaces. The Keeper may, in accordance with section 10 of PR(S)A 1937 and any Acts of Sederunt made thereunder, charge for certain types of access, e.g. supply of digital images or copies in paper form. Such licence shall include the right to grant sub-licences. This clause is always subject to clause 6.4 (*Respective obligations, access and use*) and clause 8.1.

## **9. DISPUTES**

- 9.1. Where a dispute occurs between the Keeper and the Client, then:
  - 9.1.1. the operational contacts of the parties shall negotiate in good faith to effect a resolution; and
  - 9.1.2. if the dispute is not resolved within twenty (20) Business Days from the commencement of negotiations between the operational contacts, then the dispute shall be escalated to the signatories of this Agreement; and
  - 9.1.3. if a dispute has not been resolved under clause 9.1.1 or clause 9.1.2, the parties' Chief Executives will work together in good faith to effect a resolution.

## **10. TERM, TERMINATION AND REVIEW**

- 10.1. This Agreement shall commence on the date of signature completion by both parties and shall continue for an indefinite term, until terminated in accordance with clause 10.2.
- 10.2. This Agreement shall terminate 12 months following a written agreement of both parties to that effect. The Keeper's consent to termination may be subject to the Client having in place alternative archiving and transfer arrangements which meet all applicable legal requirements and the payment of relevant costs under clause 10.3.
- 10.3. The Client is liable for costs incurred by the Keeper connected to the removal of the Client Records from the NRS (and preparations relating to the same), including costs connected with drafting inventories and preparing for the physical transfer of the Client Records. The Keeper may render its invoice in respect of such costs in advance of any work being carried out and the Client shall pay all invoices no later than 30 days from the date of each invoice.
- 10.4. Amendments to this Agreement can be made in writing, with the agreement of both parties. Each party shall give the other no less than 2 months' advance notice of any proposed amendment to this Agreement.
- 10.5 The Keeper and the Client will hold, every 3 years, but no later than every 5 years, a review meeting within 3 months of the anniversary of the Agreement commencement date, to ensure that the services specified are being maintained, and continue to reflect the requirements and if necessary, to identify any changes needed.
- 10.6 The Keeper will document any change requests for agreement by both parties to assist in managing any future changes. Once agreed, any updates and/or amendments will be formally documented and then signed off by the parties.

## **11. FORCE MAJEURE**

- 11.1 Neither the Keeper nor the Client will be liable for delay or failure to perform the obligations of the Agreement if this delay or failure results from circumstances beyond their reasonable control. The Parties shall at all times following the occurrence of a Force Majeure Event and during its subsistence use their respective reasonable endeavours to prevent and mitigate the effects of the Force Majeure Event.
- 11.2 The Affected Party shall Notify the other Party as soon as practicable after the Force Majeure Event ceases or no longer causes the Affected Party to be unable to comply with its obligations under the Agreement.
- 11.3 In the event of any delay or failure resulting from circumstances beyond their reasonable control neither Party will have the right to seek to renegotiate the terms of the Agreement.


## **12. GOVERNING LAW AND JURISDICTION**


- 12.1 This Agreement and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with it or its subject matter or formation shall be governed by and construed in accordance with the laws of Scotland.
- 12.2 Each party irrevocably agrees that the courts of Scotland shall have exclusive jurisdiction to settle any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with this Agreement or its subject matter or formation.
- 12.3 Agreement or its subject matter or formation.


IN WITNESS WHEREOF these presents typewritten on this, the 10 preceding pages and the following 6 pages are executed as follows:


SIGNED for and on behalf of the (Keeper of the Records of Scotland);

SIGNED for and on behalf of the Client (Mental Welfare Commission for Scotland);

Signature   
Gemma Beach (Mar 10, 2022 09:53 GMT)  
Name Gemma Beach  
Position Senior Procurement Specialist  
Date Mar 10, 2022

Signature   
Alison McRae (Mar 10, 2022 08:54 GMT)  
Name Alison McRae  
Position Head of Corporate Services  
Date Mar 10, 2022

Signature (witness)   
Laura Mitchell (Mar 10, 2022 09:46 GMT)  
Full name Laura Mitchell  
Position Deputy Keeper of the Records of Scotland  
Date Mar 10, 2022

Signature (witness)   
Paloma Alvarez (Mar 10, 2022 09:24 GMT)  
Full name Paloma Alvarez  
Position Information Governance Manager  
Date Mar 10, 2022

**This is the Schedule referred to in the foregoing Agreement between the Keeper of the Records of Scotland and The Mental Welfare Commission for Scotland**

**SCHEDULE 1  
Data Protection**

**1. DATA PROTECTION**

- 1.1 The parties acknowledge that Personal Data described in the scope of the Annex (*Data Processing Details*) of this Schedule will be Processed in connection with this Agreement. For the purposes of any such Processing, the parties agree that the Keeper acts as the Processor and the Client acts as the Controller.
- 1.2 This Schedule is intended to comply with UK GDPR Article 28 and/or DPA 2018 section 59 and (if applicable) pursuant to section 209(2) or 209(3) of the DPA 2018 (if applicable).
- 1.3 Both parties will comply with all applicable requirements of the Data Protection Legislation. This paragraph 1.3 is in addition to, and does not relieve, remove or replace, a party's obligations or rights under the Data Protection Laws.
- 1.4 Without prejudice to paragraph 1.3, the Controller will ensure that it has all necessary appropriate consents and notices in place to enable lawful transfer of the Personal Data to the Processor for the duration and purposes of this Agreement.
- 1.5 In relation to any Personal Data Processed in connection with its obligations under this Agreement, the Processor shall:
  - (a) Process that Personal Data only as necessary in accordance with obligations under the Agreement and any documented instructions of the Controller unless the Processor is required by Law to otherwise Process that Personal Data. Where the Processor is relying on applicable Law as the basis for Processing Personal Data, the Processor shall promptly notify the Controller of this before performing the Processing required by the Laws unless those Laws prohibit the Processor from so notifying the Controller;
  - (b) ensure that all personnel who have access to and/or Process Personal Data are obliged to keep the Personal Data confidential;
  - (c) ensure that it has in place appropriate technical and organisational measures to protect against unauthorised or unlawful Processing of Personal Data and against accidental loss or destruction of, or damage to, Personal Data in accordance with Data Protection Legislation including Article 32 (*Security of Processing*) of the UK GDPR;
  - (d) subject to clauses 7.5 and 7.6.1 (*Enquiries, requests and retransmission*), assist the Controller in responding to any requests from Data Subjects either (i) by providing the Controller with surrogate copies of the Client Records (in the first instance) or (ii) by making arrangements to provide the Controller with access to the Client Records at the Processor's premises or (iii) by retransmitting the Client Records to the Controller (where surrogate copies are insufficient to comply with a Data Subject request and subject to clauses 7.7 and 7.8 (*Enquiries, requests and retransmission*));
  - (e) assist the Controller in ensuring compliance with the Controller's obligations under the Data Protection Legislation with respect to security, breach notifications, data

protection impact assessments and consultations with supervisory authorities or regulators;

- (f) notify the Controller without undue delay on becoming aware of a Personal Data Breach;
- (g) after the end of the deposit arrangement under this Agreement, at the written direction of the Controller, return Personal Data (and any copies of it) to the Controller unless the Processor is required by Law to retain the Personal Data;
- (h) not transfer any Personal Data outside of the European Economic Area or the UK unless the prior written consent of the Controller has been obtained and the following conditions are fulfilled:
  - (i) the Controller or the Processor has provided appropriate safeguards in relation to the transfer;
  - (ii) the Data Subject has enforceable rights and effective legal remedies;
  - (iii) the Processor complies with its obligations under the Data Protection Legislation by providing an adequate level of protection to any Personal Data that is transferred (or, if it is not so bound, uses its best endeavours to assist the Controller in meeting its obligations); and
  - (iv) the Processor complies with any reasonable instructions notified to it in advance by the Controller with respect to the Processing of the Personal Data;
- (i) maintain complete and accurate records and information to demonstrate its compliance with this paragraph 1.5 and make the same available to the Controller within a reasonable time following the Controller's request and allow for audits by the Controller or its designated auditor (provided always that the Controller shall provide the Processor no less than twenty (20) Business Days' written notice of any on-site audit and shall ensure that any audit or inspection is carried out with minimum disruption to the Processor's day to day business); and
- (j) immediately inform the Controller if, in the opinion of the Processor, an instruction under paragraph 1.5(i) infringes Data Protection Legislation.

1.6 The Controller grants its general written approval for the Processor to sub-contract Processing duties to third parties in connection with this Agreement. The Controller hereby gives its specific written approval to the Processor appointing the third parties set out in the Annex (*Data Processing Details*) as the Processor's Sub-processors in connection with this Agreement. Before allowing any other Sub-processor to Process any Personal Data in connection with this Agreement, the Processor must:

- (a) notify the Controller in writing of the intended changes concerning the addition or replacement of Sub-processors, thereby giving the Controller the opportunity to object to such changes;
- (b) enter into a written agreement with the Sub-processor which gives effect to the terms set out in this paragraph 1 such that they apply to the Sub-processor; and
- (c) provide the Controller with such information regarding the Sub-processor as the Controller may reasonably require.

- 1.7 As between the Controller and the Processor, the Processor shall remain fully liable for all acts or omissions of any of its Sub-processors.
- 1.8 The Processor may charge the Controller for assistance rendered under paragraph 1.5(d) and in connection with any audits under paragraph 1.5(i).
- 1.9 The Client warrants that:
  - (a) it has complied, and will comply, with the obligations of a Controller under Data Protection Legislation; and
  - (b) neither the transfer to the Keeper nor the Processing by the Keeper of any Personal Data within the Client Records in accordance with this Agreement infringes or shall infringe Data Protection Legislation.

## Data Protection Schedule

### Annex - Data Processing Details

#### 1. Data protection officers

- (a) The contact details of the Controller's data protection officer (or its nominated representative) are:

Name: Paloma Alvarez  
Address: Thistle House, 91, Haymarket Terrace, Edinburgh, EH12 5HE  
Telephone: 0131 313 8770  
E-mail: [paloma.alvarez@nhs.scot](mailto:paloma.alvarez@nhs.scot)

- (b) The contact details of the Processor's data protection officer are:

Data Protection Officer  
National Records of Scotland  
HM General Register House  
Edinburgh  
EH1 3YY  
Email: [dataprotection@nrscotland.gov.uk](mailto:dataprotection@nrscotland.gov.uk)  
Telephone: 0131 535 1314

#### 2. Certain details relating to the Processing of Personal Data in connection with this Agreement as required by Data Protection Legislation:

Description	Details
<b>Subject matter of the Processing and Controller's instructions</b>	<b>Subject matter of the Processing:</b> the subject matter of the Processing is set out in this Agreement.
	<b>Controller's instructions:</b>  The Controller determines the access to and use of the Client Records. The Controller hereby instructs the Processor to Process any Personal Data on the following basis:  (a) for all purposes related to the performance of this Agreement;  (b) the acquisition, selection, accessioning, storage and preservation, arrangement, retransmission and description in connection with the Client Records;  (c) provision of access to the Client Records in accordance with the Controller's written instructions (which may be general or specific); and  (d) in accordance with any further written instructions with respect to Processing provided by the Controller from time to time.

	<p><b>[Specific arrangements for transfer of Client Records:</b> Records will be transferred electronically, or in paper form, in accordance with National Records of Scotland guidelines and procedures at the time of transfer.</p> <p><b>General instructions in connection with provision of public access:</b> Requests for access to open records will be granted in NRS search rooms subject to usual reader registration requirements without the need to notify The Commission. Any requests for closed material under FOISA 2002 exemptions or Data Protection legislation will be referred to the Mental Welfare Commission for its approval. See also special terms.</p>
<b>Duration of the Processing</b>	Processing shall continue until this Agreement is terminated or until the data within the Client Records is no longer considered to be Personal Data in accordance with Data Protection Legislation.
<b>Nature and purposes of the Processing</b>	<p><b>The nature of the Processing is:</b></p> <ul style="list-style-type: none"> <li>(a) recording, collecting, acquisitioning and selecting;</li> <li>(b) accessioning, storing, anonymising, analysing;</li> <li>(c) accessing, searching, retrieving, preserving, organising and structuring;</li> <li>(d) converting, modifying;</li> <li>(e) combining / linking; and</li> <li>(f) disclosing / sharing, restricting (where instructed by the Client).</li> </ul>
	<b>The purpose of the Processing is:</b> Archiving purposes in the public interest.
<b>Type of Personal Data (including identifying any special category data or data relating to criminal convictions and offences)</b>	<p>Personal Data within the Client Records, including:</p> <ul style="list-style-type: none"> <li>• The Mental Welfare Commission and its predecessor organisations have transferred records to the National Records of Scotland over time. The majority of the records are registers of people admitted to ‘asylums’, subject to guardianship orders, or under curator bonis. This could include, name, DOB, health condition, etc.</li> <li>• Data transferred from the NCF contains special categories of data as defined by article 9 of the EU GDPR. In particular, testimonies of individuals that were in institutional care and their experiences. It may also contain information about criminal convictions and offences.</li> </ul>
<b>Categories of Data Subject</b>	<p>Persons whose Personal Data is contained within the Client Records, including:</p> <ul style="list-style-type: none"> <li>• The Mental Welfare Commission and its predecessor organisations have transferred records to the National Archives of Scotland over time. The majority of the records are registers of people admitted to ‘asylums’, subject to guardianship orders, or under curator bonis. This could include, name, DOB, health condition, etc.</li> <li>• The NCF testimonies were provided by survivors of historic institutional care in Scotland. Their testimonies may contain personal information about them, their relatives, other people that were in the same institutions as them and their carers.</li> </ul>



<b>Plan for return of the Personal Data once the Processing is complete</b>	The Personal Data shall be held for preservation in the custody of the Keeper of the National Records of Scotland or with Sub-processors set out below. The Keeper shall follow the Client's instructions regarding return of any Personal Data.
<b>Sub-processors</b>	Internet Archive is the NRS Web Continuity Service Provider and shall act as Sub-processor for the Client's Websites
<b>Transfers to third countries or international organisations</b>	The Personal Data contained within the Client Records shall be held in the UK. A copy of all archived Websites, some of which may contain Personal Data, may be transferred by the Keeper's web archiving provider to servers or data centres based in the EEA, or third countries which provide appropriate safeguards, for the purpose of providing public access.
<b>Legal Basis for Processing</b>	<ul style="list-style-type: none"> <li>• Processing is necessary for compliance with a legal obligation to which the Controller is subject.</li> <li>• GDPR Article 6(1)(e): processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller.</li> <li>• GDPR Article 9(2)(j): processing is necessary for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) based on Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject.</li> <li>• GDPR Article 9 (2)(g) processing is necessary for reasons of substantial public interest, on the basis of Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject;</li> </ul>
<b>Legal gateway</b>	Section 5(1) of the Public Records (Scotland) Act 1937 and Public Records (Scotland) Act 2011
<b>Special Terms</b>	Data extracted from the NCF confidential data-base contains special categories of data (including redacted testimonies of individuals that were in institutional care and gave their testimonies to the Forum between 2015 and 2021). Although all testimonies have been redacted so they do not contain any names or institutions, nonetheless, given the length and amount of qualitative information, and to protect participants' identities, the testimonies will be under restricted access arrangements for 100 years. Special applications to access them will need to be submitted to the National Records of Scotland and authorised by the Mental Welfare Commission for Scotland. The Mental Welfare Commission will request additional safeguards for accessing this data in order to ensure that the rights and freedoms of the data subject (NCF participants) are respected and their confidentiality secured throughout their lifetimes.











# NRS - Mental Welfare Commission - Archive Deposit Agreement - 09 03 2022

Final Audit Report

2022-03-10


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